No. 70-69

IN THE

Supreme Court of the United States

October Term, 1971

UNITED STATES OF AMERICA, *Appellant*

v.

GEORGE JOSEPH ORITO, *Appellee*

On Appeal from the United States District Court for The Eastern District of Wisconsin

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

STATUTES INVOLVED

18 U.S.C. §1462 provides in pertinent part:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce —
>
> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character. . . .

18 U.S.C. §1465 provides in pertinent part:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribu-

tion any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

19 U.S.C. §1652 provides:

If any provision of this chapter, or the application thereof to any person or circumstances, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances, shall not be affected thereby.

33 U.S.C. §950 provides:

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

Section 18, Act June 25, 1948, C. 645, 62 Stat. 683, 859-862 provides:

If any part of Title 18, Crimes and Criminal Procedure, as set out in section 1 of this Act, shall be held invalid the remainder shall not be affected thereby.

SUMMARY OF ARGUMENT

Section 1462 of Title 18, United States Code, imposes criminal sanctions upon one who transports obscene materials across state lines by means of a common carrier. Section 1465 of Title 18, United States Code, provides the same penalty for one who transports obscene materials across state lines for the purpose of distribution or sale.

Appellee was indicted for a violation of Section 1462; the indictment alleged that he carried eighty-three obscene films on the airlines from San Francisco to Milwaukee. The United States District Court for the Eastern District of Wisconsin held that Section 1462 permitted the imposition of criminal sanctions upon conduct protected by the First Amendment and declared the statute to be void. The Government appealed from the dismissal of the indictment.

Stanley v. Georgia, 394 U.S. 557 (1969), held that the First Amendment protects the right of an individual to enjoy obscene materials in the privacy of his home and that the private possession of such materials cannot be made a criminal offense. Appellee argues that *Stanley* protects the private possession of obscene materials regardless of where they are possessed, as long as the possession does not entail a serious threat that minors or unwilling adults will be exposed to the materials.

Section 1462 prohibits possessory transportation. The likelihood that materials being carried by common carrier will inadvertently fall into the hands of minors or sensitive adults is no greater than that Stanley's collection would fall into their hands.

Appellee illustrates the unconstitutional sweep of Section 1462 with hyphotheticals which he asserts are protected by *Stanley*. The rationale of *Stanley* is that private use and enjoyment is protected and that for this reason a possession necessarily incident to this use is protected as well. From this logic appellee concludes that one who reads an obscene book on a commercial airline is protected, provided he does not display this book to minors or to adults who might be offended. Similarly, the actual possession of an obscene book in the pocket of an interstate traveler is protected as an incident of his intended personal enjoyment. It does not extend the holding of *Stanley* to likewise protect the possession of an interstate traveler when the obscene materials are in his luggage rather than his pocket. And finally, *Stanley* protects the individual who ships his collection of obscene materials from his residence in one state to his residence in another, or who entrusts his obscene materials to a moving company as he moves his household effects from an old residence to a new residence. Each of these examples illustrates a circumstance in which a protected possession would fall within the ambit of Section 1462.

The Government concedes the possible application of Section 1462 to a private possessory transportation, but urges that this Court should not reach the overbreadth issue. It argues at the outset that appellee's prior conviction for a violation of Section 1462 and the number of films involved permit the inference that appellee was engaged in the sale or distribution of these films, and that since his conduct is not protected by *Stanley*, he cannot assert the rights of those whose conduct would be protected.

The Government would distinguish the line of cases which have given standing to persons whose conduct

could have been prohibited by a more narrowly drawn statute on the grounds that a single prosecution and interpretation of Section 1462 could limit its scope to noncommercial possessory transportation. It overlooks the fact that such a construction would create a new element of the offense, and that such a construction is neither supported by Congressional history nor authorized by the severability provisions of Title 18. Unless this Court were to render an advisory opinion covering each of the illustrations suggested by appellee, as well as those illustrations not thought of by appellee, individuals would remain in doubt whether a given private possession of obscene materials was protected by the First Amendment.

If this Court concludes that appellee cannot challenge the overbreadth of Section 1462 because a single limiting construction of the Section will save its constitutionality and will not thereby create an offense which was not enacted by Congress, then appellee urges that his conduct on the state of this record is protected and that the statute must be construed to protect his rights.

As a final argument, the Government urges that even if appellee has standing and even if the statute is overbroad, this Court should interpret Section 1462 to apply only to transportation for purposes of sale or distribution. Appellee asserts that such a construction would create a new offense not contemplated by Congress in the enactment of Section 1462. Such a construction would create insurmountable problems of proof and would require the creation of some sort of presumption similar to that which appears in Section 1465. It is not as though Congress was unaware of the implications of prohibiting private possessory transportation. Precisely such cir-

cumstances were considered when Section 1465 was enacted. Had Congress wished to restrict the transportation of Section 1462 to the commercial transportation prohibited in Section 1465, it could have done so when Section 1462 was amended in 1970. Congress apparently intended that Section 1462 encompass private possessory transportation; in the face of this intent, a rewriting of the statute by this Court would be inappropriate.

As a second argument, appellee asserts that Section 1462 violates a right of privacy guaranteed by the Ninth Amendment. He views the Ninth Amendment as protecting all possession of obscene materials whether for purposes of sale or not, and urges that only a compelling governmental interest in this possession will warrant the creation of a federal crime which imposes sanctions upon it. In this context appellee distinguishes those cases which have held that the mails may not be used for the commercial distribution of obscene materials and those which hold that no one has the right to import obscene materials for the purpose of commercial distribution. In each of such cases the Government has a compelling interest in preventing the use of its own facilities for the business of purveying pornography. The mere possession of obscene materials for sale or the possessory transportation of obscene materials for sale is conduct in which the federal government has no significant interest. The moral fabric of the community is a matter peculiarly within the police powers of the states. *Roth v. United States,* 354 U.S. 476, 504-505 (1957) (Harlan, J., dissenting in part).

While a state might create an offense proscribing possession of obscene materials for sale justifying the offense on the grounds that such materials might be harmful,

a substantially greater showing of harm must be made before Congress can impose criminal sanctions upon the transportation in interstate commerce of the purportedly noxious materials.

Oregon has accepted the invitation of this Court in *Reidel* and effective January 1, 1972 adults in Oregon may purchase, sell and view obscene materials provided the exhibition or distribution is not conducted in a manner which offends those who do not wish to be exposed to this material. Section 1462 effectively prevents Oregon from experimenting with this legislation. The right of the people of Oregon to view communicative materials regardless of their obscenity is practically foreclosed by statutes which prevent the shipment of these materials into the state.

Appellee recognizes that the right to be let alone is not an absolute right, but asserts that in this circumstance he has a right to be let alone by the federal government regardless of whether a valid state statute could regulate his conduct. When the conduct of an individual is restricted by a criminal statute enacted by a sovereignty which has no legitimate interest in preventing such conduct, the Ninth Amendment is offended.

ARGUMENT

I. SECTION 1462 IS VOID FOR OVERBREADTH.

A. Section 1462 is Overboard Because It Can Be Applied to Interstate Transportation of Obscene Material for Personal Use.

The decisions of *United States v. Reidel*, 402 U.S. 351 (1971), and *United States v. Thirty-Seven (37)*

Photographs, 402 U.S. 363 (1971), leave many questions unanswered. Just as it appears that *Stanley v. Georgia*, 394 U.S. 557 (1969), concerned itself only with the private possession of obscene material, *Reidel* and *Thirty-Seven (37) Photographs* dealt only with commercial distribution or importation by means of government facilities. Other forms of obscenity-related activity have yet to be considered. Appellee submits that many of these activities are constitutionally protected and also fall within the ambit of Section 1462 of Title 18, United States Code. Because these activities are constitutionally protected, Section 1462 is necessarily void for overbreadth.

The Government concedes that Section 1462 could be applied where obscene material is transported by common carrier in interstate commerce for the transporter's personal use. (Brief for the United States, p. 12). Yet it was the personal use of obscenity which this Court protected from governmental interference in *Stanley v. Georgia, supra*. Because Section 1462 prohibits interstate transportation of obscene materials which are intended for the private use of the transporter, the section is fatally overbroad.

As a first illustration of this overbreadth, Section 1462 could be applied where persons travelling interstate were simultaneously engaged in reading obscene material. It is not uncommon for interstate travelers on commercial airliners, trains, and buses to read.[1] In this instance the passenger reading obscene material would be directly engaged in the process of receiving "information and ideas, regardless of their social worth. . . ." *Stanley v.*

[1]Common carriers are engaged in the transportation of goods and persons. See, 49 U.S.C. §1(1)(a), (3)(a).

Georgia, 394 U.S. at 564. Although the reader is engaged in unlawful conduct under the federal statute, he is at the same time engaged in the very activity which *Stanley* declared protected. 394 U.S. at 565.

The protection which was granted to viewing obscene material in *Stanley* has not been withdrawn by either *Reidel* or *Thirty-Seven (37) Photographs. Reidel* reaffirms the emphasis in *Stanley* on protection for "freedom of mind and thought" and quotes approvingly the language of *Stanley* that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *United States v. Reidel,* 402 U.S. at 356. See also, *United States v. Thirty-Seven (37) Photographs,* 402 U.S. at 376. Moreover, this Court in *Reidel* also stated:

> "[The] rights to have and view that material in private are independently saved by the constitution." 402 U.S. at 356.

As a second illustration, Section 1462 could be applied where the interstate transportation and possession combine with an intent to use the obscene material privately. In this instance the traveler with baggage containing obscene material is not engaged in reading the material while in transit, but he possesses it solely for his own use. His possession is equivalent to the possession of Stanley. Stanley was not viewing the materials when the search and seizure took place. Yet the Court recognized that possession for personal use was an activity closely related to the receipt of information and ideas and declared that possession protected. Just as the possession in *Stanley* was protected as an incident of personal use, so possession on a common carrier as an incident of personal use is also protected.

In these two hypotheticals, the possessors of the obscene materials accompany the materials while in transit without a purpose commercially to distribute the materials.

In a third hypothetical, the activities of transportation and possession do not occur simultaneously. The activity is undertaken solely for a private purpose with no intent to distribute. For example, a collector of pornography ships materials from his residence in one state to his residence in another. The collector would be exercising his continuous possession of his own material although he is both the shipper and consignee. In this example there is no act of distribution. This hypothesized conduct falls within the right to possess declared in *Stanley*. Appellee urges that the third hypothetical also falls within the scope of his right to receive. As stated by Mr. Justice Harlan in his concurrence to *Reidel*:

> "In other words, the 'right to receive' recognized in *Stanley* is not a right to the existence of modes of distribution of obscenity which the State could destroy without serious risk of infringing on the privacy of a man's thoughts; rather, it is a right to a protective zone ensuring the freedom of a man's inner life, be it rich or sordid." 402 U.S. at 359-360.

The foregoing illustrations of protected conduct all occur in essentially private settings. Any possibility of exposure of the material to children or intrusion upon unwilling adults is no greater than that in *Stanley*. Nonetheless the Government would restrict the privacy protected by *Stanley* to the home. "As far as obscene material is concerned, the rights one enjoys in the home are not the same as those enjoyed elsewhere." (Brief for the United States, p. 12.) The Government advances its

position by suggesting that *Stanley* is as much a Fourth Amendment privacy decision emphasizing the sanctity of the home, as it is a First Amendment decision. (Brief for the United States, pages 10-11.) This Court in *Stanley,* however, specifically mentioned that the setting of privacy within the home only gave "added dimension" to Stanley's right to receive information and ideas. 394 U.S. at 564. The holding in *Stanley* is that the First Amendment protects a person's right to read or observe what he wishes so long as he is in a private setting. The Fourth Amendment was not the basis for the majority opinion in *Stanley.* Nor is there any suggestion in *Reidel* or *Thirty-Seven (37) Photographs* that *Stanley* was based upon a Fourth Amendment concept of privacy.

The First Amendment also creates a zone of privacy. This Court stated in *Katz v. United States,* 389 U.S. 347, 350 (1967):

> "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion."

At footnote 5 of the same page the Court stated:

> "The First Amendment, for example, imposes limitations upon governmental abridgement of 'freedom to associate and privacy in one's associations.' N.A. A.C.P. v. Alabama, 357 U.S. 449, 462."

Even if appellee were to accept the Government's Fourth Amendment rationale for *Stanley,* he would not be able to accept the theory advanced that this right of privacy only encompasses in-home possession of obscenity. Under Fourth Amendment analysis, the concept

of privacy extends beyond one's residence. As was stated in *Katz,* 389 U.S. at 351:

> "[T]his effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case. *For the Fourth Amendment protects people, not places.* What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (emphasis supplied).

Similarly, the First Amendment protects people, not places. The Government's preoccupation with the privacy of the home must be rejected.[2] Possession of obscene material which occurs in other private contexts is no less protected under the First Amendment.

At the outset the Government justifies a ban against all forms of interstate transportation of obscene materials by arguing that the risk of dissemination to unwilling recipients by accident or inadvertence will be decreased.[3] (Brief for the United States, p. 14). This Court stated

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[2]This Court in *Mancusi v. DeForte,* 392 U.S. 364, 368 (1968), stated:

> "The Court's recent decision in *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed 2d 576, also makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."

[3]The Government would draw the distinction between the luggage of an interstate traveler on a common carrier and the home on the grounds that suitcases can break open and the films might be exposed to unwilling viewers. The danger that appellee's suitcase will break open in transit and thereby expose obscene films to those who would be offended is no greater than the danger that sensitive burglars or delinquent juveniles would break into Stanley's house and be offended by his collection of erotica.

in *N.A.A.C.P. v. Alabama,* 377 U.S. 288, 307 (1964), that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." See also *Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

Secondly, the Government claims that it "is frequently extremely difficult to differentiate between what is intended for private and public dissemination." (Brief for the United States, p. 15.)[4] Essentially the same justification was advanced by the State of Georgia in support of its statute and rejected by this Court in *Stanley*:

> "Finally, we are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws." 394 U.S. at 567-568.

Finally, the Government notes that as a matter of policy it does not seek enforcement of the federal ob-

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[4] *Cf.*, the Government's assertion in the same brief that "there is a clear conceptual line between commercial distribution and transportation for private use." (Brief for the United States, p. 6). See also, the Government's assertion that: "The distinction between transportation of obscenity for commercial purposes and that for personal use is sufficiently clear to remove any uncertainty regarding the reach of the statute." (Brief for the United States, p. 19).

scenity statutes where private or personal conduct is involved, citing *Redmond v. United States,* 384 U.S. 264 (1966). Although appellant denies it, this can be nothing other than a concession that Section 1462 is overbroad. Moreover, it is a concession that the Government has no legitimate interest in interfering with the First Amendment activity of personal possession or use of obscene materials.

B. Appellee Has Standing to Assert the Overbreadth of Section 1462.

The Government argues that appellee does not have standing to challenge the statute on its face since the indictment charges appellee with having transported materials under circumstances which imply that the materials were not for his own personal use.[5]

Appellee is charged with carrying eighty-three obscene films from San Francisco to Milwaukee. The indictment alleges that he carried these films on Trans-World Airlines and North Central Airlines. It is impossible to determine from this indictment whether there are any duplicates among these eighty-three films. Sixty-eight of the films are labeled with nine different numbers; none of the remaining films even bear the same label. Since the indictment alleges that appellee carried the films in interstate commerce, even though such conduct is not an element of Section 1462, it is reasonable to assume that appellee was a passenger on the aircraft and that the films were in his luggage.

Appellee was indicted for a violation of 18 U.S.C. §1462, and the language of the charge, with the excep-

[5]Brief for the United States, p. 19, note 8.

tion of the allegation that he carried the films, conforms to the statute. It is not alleged that the purpose of appellee's carrying these films was commercial, nor that he intended to sell or distribute these films. It is merely alleged that he carried them from San Francisco to Milwaukee.[6]

From this indictment and the fact that appellee was previously convicted of a violation of Section 1462, the Government asks this Court to infer that the purpose of appellee's carrying these films on the aircraft was commercial. The inference is unwarranted. The Government infers that one who has previously been convicted of being in the business of distributing obscenity is still in that business; it further infers that films bearing the same labels have identical contents and that he who has several copies of a particular film must be in the business of distributing films; and then from these inferences it further infers that the allegedly obscene films enumerated in the indictment were being transported in furtherance of that distribution. Appellee asserts that the facts are too far removed from the final inference which must be drawn; that the logic of the inferences is too attenuated; and that inferences may not be pyramided upon other inferences. *United States v. Ross*, 92 U.S. 281, 283 (1876).

The inference of transportation for purposes of sale or distribution being inappropriate, if this Court is to draw any inference it must assume that the collection of

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[6]It is of interest that appellee was not indicted for violating 18 U.S.C. §1465 although the allegations in the indictment would raise a presumption under that statute that the transportation was for sale or distribution. While it may be argued that the legislative history of Section 1465 confines its scope to private carriers, the language of the enactment certainly contains no such restriction.

erotica was for the personal possession and enjoyment of appellee. This personal possession is protected by *Stanley v. Georgia,* 394 U.S. 557 (1969), and no subsequent opinion of this Court has withdrawn this protection. It is no answer that the Government only prosecutes this private possession because appellee was previously convicted of this offense and hence there are "aggravating circumstances." *Redmond v. United States,* 384 U.S. 264 (1966). Appellee is not protected by the solicitude of the Solicitor, but by the Constitution.

Stanley interpreted the First Amendment to confer the right to possess privately obscene materials. No majority opinion of this Court since *Stanley* has restricted this right to the residence of the possessor. Each of the cases decided since *Stanley* has considered proposed extensions of the *Stanley* rationale to situations in which others could assert derivative rights related to the commercial distribution of obscenity. In *United States v. Reidel,* 402 U.S. 351 (1971), this Court refused to extend Stanley's right to possess to Reidel's right to distribute by the mails; in *United States v. Thirty-Seven (37) Photographs,* 402 U.S. 363 (1971), this Court refused to extend the right to possess to encompass the right to import for commercial distribution; in *Gable v. Jenkins,* 397 U.S. 592 (1970), the Court held that Stanley's right to possess did not confer upon a bookseller the correlative right to purvey pornography. See *United States v. Reidel,* 402 U.S. at 355. In each instance *Stanley* was not expanded to confer derivative First Amendment protections to those who distribute obscene material.

Appellee does not urge an extension of *Stanley;* he seeks no derivative rights from a possessor. He is a

possessor and asserts that the logic of *Stanley* compels the holding that one who possesses obscene material cannot be prosecuted for the act of possession and that it makes no difference where this private possession occurs. He asserts that absent any allegation that he intends to expose others to his collection of pornography or any allegation that his possession is a stage in a distributive process, his possession is protected by the First Amendment regardless of whether he is in his home or on an aircraft. For these reasons, appellee has standing to challenge Section 1462 on its face and as applied to him.

Even if this Court were to infer that the purpose of appellee's possession was commercial and hence unprotected, he nevertheless has standing to assert that the statute is overbroad as applied to transportation for personal use. This Court, as the Government concedes, has "consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski v. Pfister,* 380 U.S. 479, 486 (1965). (Brief for the United States, pp. 16-17).

In *N.A.A.C.P. v. Button,* 371 U.S. 415, 432 (1963), this Court stated:

> "For in appraising a statute's inhibitory effect upon [First Amendment] rights, this Court has not hesitated to take into account possible application of the statute in other factual contexts besides that at bar."

A censorship statute may be challenged on its face as violative of First Amendment rights "whether or not [a defendant's] conduct could be proscribed by a properly drawn statute. . . . " *Freedman v. Maryland,* 380 U.S. 51, 56 (1965).

The Government candidly acknowledges that this relaxed rule of standing was established to permit challenge to statutes which have a chilling effect on the exercise of First Amendment rights. Moreover, the reason for invalidating such an overbroad statute is to eliminate any deterrence of constitutionally protected activity. Because of the preferred status of First Amendment rights, individuals may attack a statute regardless of the nature of their own conduct in order to protect the rights of other persons who would otherwise refrain from exercising their First Amendment rights due to the vagueness or overbreadth of the statute. As this Court stated in *N.A.A.C.P. v. Button*, 371 U.S. at 432-433:

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."

The Government argues that the chilling effect rationale is inapplicable to this case because the overbreadth of Section 1462 can be eliminated in a single prosecution, rather than by piecemeal construction. Appellant asserts that only where a statute is vague is it susceptible of varying interpretations and are repeated challenges required to delineate the permissible scope of the statute. It further argues that Section 1462 is not vague and is overbroad in only one respect, i.e., it can be applied to transportation for personal use. This analysis overlooks the fact that Section 1462 is capable of several unconstitutional applications because of its overbreadth, just as a vague statute is capable of several impermissible interpretations. Appellee has previously posited several

instances in which the statute can be applied to protected activity. Each aspect of overbreadth would have to be dealt with in a separate prosecution and would not necessarily be remedied by one saving construction of the statute excluding all "separable applications." See Stern, *Separability and Separability Clauses in the Supreme Court,* 51 Harv. L. Rev. 76, 79 (1937).

C. Section 1462 is Not Susceptible of a Narrowing Construction Limited to Unprotected Conduct.

The Government closes its argument by contending that Section 1462 could be saved by a limiting construction in a single prosecution. Therefore, it argues, it was unnecessary and improper for the District Court to declare the statute void on its face. If this Court were to interpret Section 1462 to apply only to interstate transportation for sale or distribution, it would be adding an essential element to the crime. It would be inserting a requirement that the activity be accompanied by an intent to sell or distribute the material. This would amount to a major and substantial alteration of the statute.

The Government's proposed reconstruction of Section 1462 can be viewed as either one of two processes. Either the Government has asked this Court to add an element to the offense of transportation of obscene material which was not contemplated by Congress, or, in the alternative, this Court is asked to sever from the statute one of its possible applications. The first view runs afoul of the principle that Congress enacts law and not this Court;[7] the second overlooks the fact that the severability provisions which apply to Title 18, United States Code, do

[7]This Court stated in *Blount v. Rizzi,* 400 U.S. 410, 419 (1971): "[I]t is for Congress, not this Court, to rewrite the statute."

not authorize the severance of applications of the statute as, for example, do the severability provisions contained in 19 U.S.C. §1652.[8]

Section 1465, which also prohibits interstate transportation of obscenity, contains the express requirement that the activity be engaged in "for the purpose of sale or distribution." That particular language was enacted in 1955 by the Congress. Yet to this date Congress has made no comparable change in Section 1462 even though it was amended in 1970.

The District Court properly declared the statute void on its face since traditional rules of severability are inapplicable to statutes which are overbroad in the First Amendment area.[9]

Finally, the clarity of Section 1462's language prevents this Court from excising any applications of the stat-

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[8]Although Title 18 of the United States Code includes a general severability provision, Sec. 18, Act of June 25, 1948, C. 645, 62 Stat. 683, 859-862 (U.S.C.A. 1969), the provision is inapplicable to the instant case. No word of Section 1462 is sought to be severed; instead, it is the application of the statute to one who transports obscenity, without an intent to sell or distribute, that the Government urges be read out of 1462. If Title 18 contained a severability clause similar to that in 19 U.S.C. §1652 or 33 U.S.C. §950, such an excision would be feasible; however, this is not the case.

[9]The constitutional doctrine of First Amendment overbreadth expressed in *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *United States v. Robel*, 389 U.S. 258, 265-266 (1967); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963); and *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940), overrides any legislative or congressional policy of separability. "Since [a separability] provision only declares legislative intent that the invalidity of one portion or application of the statute should not invalidate the law entirely, the clause is immaterial to a rule which is applicable regardless of the desires of the legislature." Note, *Inseparability in Application of Statutes Impairing Civil Liberties*, 61 Harv. L. Rev. 1208, 1213 (1948).

ute. As was stated in *Aptheker v. Secretary of State*, 378 U.S. 500, 515-516 (1964):

> "The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting . . . ."

This reasoning was later reiterated in *United States v. Robel*, 389 U.S. 258, 267-268 (1967):

> "We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress."

Appellee concludes that Section 1462 sweeps within its ambit noncommercial possessory transportation of obscene materials and that such possession is protected by the First Amendment. For this reason Section 1462 is overbroad. Any attempt to narrow the application of 1462 to constitutionally permissible objectives would create a statute which Congress did not pass and would require multiple prosecutions to define the reach of the new offense. Appellee has standing to raise the overbreadth of Section 1462 and to invoke this overbreadth to void the statute.

II. SECTION 1462 IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT CAN BE APPLIED TO INTERSTATE TRANSPORTATION OF OBSCENE MATERIAL FOR DISTRIBUTIVE PURPOSES BY METHODS WHICH DO NOT INVOLVE GOVERNMENT OWNERSHIP OR OPERATION.

Appellee has earlier asserted that interstate transportation of obscene material is merely a form or incident of possession and that absent any commercial purpose this in-transit possession is protected by *Stanley*.

The issue remains whether transportation, even for purposes of sale, can be prohibited and, if so, by whom. Appellee continues to assert that transportation is a form of possession and questions whether possession for purposes of sale can be made criminal. It has been recognized at least since the separate opinion of Mr. Justice Harlan in *Roth v. United States*, 354 U.S. 476, 496 (1957), that the interest of the federal government in suppressing pornography is secondary to that of the states.

> "But in dealing with obscenity we are faced with the converse situation, for the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric." *Id.* at 504-505.

Thus, while a state legislature might validly conclude that it was worthwhile to experiment with a statute

which prohibited the possession of obscene matter for purposes of sale, it is not at all clear that Congress could enact such a statute. The power of Congress to enact Section 1462 is derived from the Commerce Clause, United States Constitution, Article I, Section 8, and while it is well established that this power extends to prohibiting noxious articles from interstate commerce, it does not extend to prohibiting articles which apparently cannot be demonstrated to have any harmful effect. *Stanley v. Georgia,* 394 U.S. at 566-567.

Each of the cases which has held that there is no right to distribute obscene material involved situations in which the federal government had a distinct, pervasive and exclusive interest in the mode of distribution. In *Reidel* the Court emphasized that Reidel sought to utilize the federal postal system to purvey obscenity and held that the Government was not required to allow its postal facilities to be used for this purpose.

> "He has no complaints about governmental violations of his private thoughts or fantasies, but stands squarely on a claimed First Amendment right to do business in obscenity and *use the mails in the process.*" (emphasis supplied) *United States v. Reidel,* 402 U.S. 351 at 356.

This Court has traditionally recognized the plenary power of Congress to regulate the mails and customs as distinct from its power to regulate interstate commerce. As long ago as *Ex parte of Jackson,* 96 U.S. 727 (1878), it was specifically noted that Congress possessed a broader power to exclude material from the mails than it did from other modes of shipment.

> "But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails." *Id.* at 735.

In *In re Rapier,* 143 U.S. 110 (1892), this Court explained that the Congressional power was greater over the postal system because it involved a direct use of government facilities:

> "The circulation of newspapers is not prohibited, but the Government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people." *Id.* at 134.

See also, *Public Clearing House v. Coyne,* 194 U.S. 497, 506-507 (1904), and *Roth v. United States,* 354 U.S. at 493, for discussions of the extent of government control of the mails.

In *Thirty-Seven (37) Photographs* the claimant sought to require the acquiescence of customs inspectors to his importation of obscene photographs for the purpose of subsequent commercial exploitation. Again the Court held that the historic right of the sovereign to exclude imports foreclosed the claimant.

> "Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country." 402 U.S. at 376.

As with the mails, an essential difference in the power of Congress to regulate customs as compared to interstate commerce has been recognized. In *Brolan v. United States,* 236 U.S. 216, 218 (1915), this Court noted:

> "Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, *so far as interstate commerce is concerned,* it is not to be doubted that from the beginning Congress has exercised a plenary power in re-

spect to the exclusion of merchandise brought from foreign countries. . . ." (emphasis supplied)

Elsewhere in the same opinion, the Court referred to the "broad distinction which exists between the two powers" "of Congress to regulate interstate commerce" and "to absolutely prohibit foreign importations." *Id.* at 222. See also, *University of Illinois v. United States,* 289 U.S. 48, 57 (1933).

The line of cases which emphasizes the plenary power of Congress to regulate the mails and to restrict imports continues through *Roth* and finds most recent expression in *Reidel* and *Thirty-Seven (37) Photographs.*

Thus *Reidel* and *Thirty-Seven (37) Photographs* can each be read to mean that the distribution of obscenity is a dirty business and that no one has the right to force the government to be a partner in the sordid enterprise. Neither should be read to authorize the prosecution of a possessor of obscenity who does not seek to involve the Government in his distributive process.

Appellee suggests that at least so far as the federal government is concerned transportation for purposes of sale and possession for purposes of sale are protected activities absent certain specific objections. Such objections as insufficient insulation from children or unwilling adults public pandering, concededly might vitiate the protected status of the conduct involved, and under such circumstances penal sanctions could be applied. But as long as the possession and transportation are effected in a manner consistent with the expectation of privacy, that privacy exists.

Appellee asserts that even the commercial distributor has a reasonable expectation of privacy. He has a right

to be let alone by the federal government just as long as he doesn't seek the affirmative cooperation of the government in running his business. The reach of the Commerce Clause is shortened by this right to be let alone and Section 1462 invades this right of privacy and offends the Constitution.

In *United States v. Reidel*, 402 U.S. 351, 357 (1971), the Court invited state legislatures to consider amending obscenity laws to permit adults access to such materials.

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. . . . This may prove to be the desirable and eventual legislative course. But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances. *Roth* and like cases pose no obstacle to such developments." *Id.*

Oregon has enacted new legislation in the area of obscenity. It is no longer unlawful for adults to sell, purchase or view what is obscene unless the distribution is done in such a manner that juveniles and unwilling recipients are protected. Chapter 743, Oregon Laws of 1971, Sections 255 through 262 (effective January 1, 1972). Section 1462 stands athwart the channels of distribution and prevents the shipment by common carrier of obscene materials into Oregon regardless of the intent of the Oregon legislature, and regardless of whether the state in which the shipment originated similarly permitted the production of obscene materials.

The right of the individual to be let alone and to enjoy his zone of privacy can only be invaded by some compelling governmental interest. *Griswold v. Connecticut*, 381 U.S. 479 (1965). In any given circumstance the interest of the federal government may be greater or less than that of a state. When the interest of one of these sovereigns does not justify the invasion of this privacy, then the Ninth Amendment is violated, and the Statute which authorizes this invasion is unconstitutional, even though the invasion by a sovereign with a more compelling need might not be prohibited. In this sense Section 1462 must fail; it permits the invasion of a zone of privacy by a government when it has no compelling need to do so.

CONCLUSION

For the foregoing reasons appellee respectfully urges this Court to affirm the order of the District Court dismissing the indictment and holding that 18 U.S.C. §1462 is violative of the Constitution.

Respectfully submitted,

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